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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, petitioner,
v.
WESLEY L. SISCHO.

No. ——.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

On April 29, 1918, the United States filed a complaint in the District Court for the Western District of Washington against Wesley L. Sischo, master of the gasoline launch *Nellie Evelyn*, to recover a penalty of $6,400 which was alleged to be due under section 2809, Revised Statutes, section 5506, Compiled Statutes, for failure to manifest certain merchandise, viz, 100 tins of opium prepared for smoking, which opium, it was alleged, had been brought into the United States by the said defendant. (R. 1, 2.) A general denial was filed (R. 3, 4), and the case was tried to the

court. (R. 4.) The bill of exceptions (R. 19–21) states that the United States offered evidence tending to prove all the allegations of the complaint, and also offered certain evidence as to the value of the opium, and particularly offered evidence of the admission by the defendant that he had paid $6,400 for the opium in Canada. (R. 20.) The district court entered judgment against the United States (R. 19) on the grounds stated in an elaborate opinion (R. 4–19, 262 Fed. 1001), viz, that section 2809 of the Revised Statutes did not apply to an article, like opium prepared for smoking, whose importation into this country was absolutely prohibited, nor to an article, like opium prepared for smoking, whose value could not possibly be ascertained since there was and could be no market for it. On writ of error, the majority of the Court of Appeals, Judge Hunt dissenting, affirmed the judgment on the sole ground that section 2809 of the Revised Statutes does not apply to an article whose importation into this country is prohibited. (R. 29–38, 270 Fed. 958.)

Thereupon this writ of certiorari was granted on application of the United States, which alleged that the decision of the Court of Appeals for the Ninth Circuit was contrary, in effect, to the decision of the Court of Appeals for the Second Circuit in *Feathers of Wild Birds* v. *United States*, 267 Fed. 964, and of the Court of Appeals for the Eighth Circuit in *Estes* v. *United States*, 227 Fed. 818.

No merchandise shall be brought into the United States, from any foreign port, in any vessel unless the master has on board manifests in writing of the cargo, signed by such master. (Sec. 2806, R. S.)

Every manifest required by the preceding section shall contain:

First. The name of the ports where the merchandise in such manifest mentioned were taken on board, and the ports within the United States for which the same are destined; particularly noting the merchandise destined for each port respectively: *Provided, however*, That the master of a vessel laden exclusively either with sugar, coal, salt, hides, dyewoods, wool or jute butts, consigned to one consignee, arriving at a port for orders, may be permitted to destine such cargo or determine its disposition "for orders," upon entering the vessel at the customhouse, and, within fifteen days afterward and before the unloading of any part of the cargo, to amend the manifest by designating the actual port of discharge of such cargo: *Provided, further*, That in the event of failure to designate the port of discharge within fifteen days such cargo must be discharged at the port where the vessel entered.

Second. The name, description, and build of the vessel; the true admeasurement or tonnage thereof; the port to which such vessel belongs; the name of each owner, according to the register of the same; and the name of the master of such vessel.

Third. A just and particular account of all the merchandise, so laden on board, whether in packages or stowed loose, of any kind or nature whatever, together with the marks and numbers as marked on each package, and the number or quantity and description of the packages in words at length, whether leaguer, pipe, butt, puncheon, hogshead, barrel, keg, case, bale, pack, truss, chest, box, bandbox, bundle, parcel cask, or package, of any kind or sort, describing the same by its usual name or denomination.

Fourth. The names of the persons to whom such packages are respectively consigned, agreeably to the bills of lading signed for the same, unless when the goods are consigned to order, when it shall be so expressed in the manifest.

Fifth. The names of the several passengers on board the vessel, distinguishing whether cabin or steerage passengers, or both, with their baggage, specifying the number and description of packages belonging to each respectively.

Sixth. An account of the sea stores remaining, if any.

(Sec. 2807, R. S., amended June 3, 1892, c. 86, sec. 1, 27 Stat. 41.)

If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and

all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such vessel, shall be forfeited. (Sec. 2809, R. S.)

The word "merchandise," as used in this title, may include goods, wares, and chattels of every description capable of being imported. (Sec. 2766, R. S.)

Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the act of January 17, 1914, c. 9, 38 Stat. 275:

That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law. * * *

SEC. 6. That hereafter it shall be unlawful for any person subject to the jurisdiction of the United States to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any opium or cocaine, or any salt, derivative, or preparation of opium or cocaine, to any other country; * * *.

SEC. 8. That whenever opium or cocaine or any preparation or derivatives thereof shall

be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes.

QUESTION INVOLVED.

The main question involved in the case at bar is whether or not opium prepared for smoking, whose importation into this country is absolutely prohibited by section 1 of the act of February 9, 1909, c. 100, as amended by the act of January 17, 1914, c. 9, is, if actually brought into this country, without inclusion in a manifest, within the provisions of section 2809, Revised Statutes, as being "merchandise" "brought into the United States," and not included or described in "the manifest."

ARGUMENT.

I.

Opium prepared for smoking, though its importation be prohibited, is within the letter and spirit of section 2809, R. S.

The decision of the Court of Appeals for the Ninth Circuit must be rested upon a limited meaning given to one or all of three expressions in the language of the statute:

(1) The word "merchandise."
(2) The words "brought into the United States."
(3) The word "manifest."

There can be no doubt that the case at bar falls within the provisions of section 2809 unless it be excluded therefrom by the meaning attached to the three expressions referred to above. They will therefore be considered in their order:

(1) The word "merchandise" means nothing else than personal property which is the subject of sale or barter. Even that meaning may be too limited for application to the customs revenue laws, since it was held in the case of *United States* v. *Chesebrough*, 176 Fed. 778, 781, 782, that the word "merchandise" included articles brought in the passenger's baggage and not intended for sale, and this was also held in *Von Catzhausen* v. *Nazro*, 15 Fed. 891, 898.

The theory of the district judge and of the majority of the Court of Appeals in the present case was that an article lost its quality of "merchandise" if its importation into the commerce of this country was absolutely prohibited, and this theory was supported by the court partly by the language of section 2766, Revised Statutes, which provides that the word "merchandise" as used in the customs revenue statutes "may include goods, wares, and chattels of every description capable of being imported," the lower courts being of the opinion that the words "capable of being imported" mean legally capable of being imported. It is submitted, however, that this limited meaning of the word "merchandise" can not be fairly adopted. The fact that the importation of an article which would otherwise be undoubtedly "merchandise" is prohibited, and that this prohibition is sanctioned

by a penalty upon the person importing it or selling it after importation, can not change the actual nature of the article itself, which is the important thing in the view of the statutes. Congress realized, and this court realizes, that, in spite of the prohibition, the article may be physically brought into this country for sale, and may be sold thereafter, the person bringing it in being willing to take the risk of the punishment which may be inflicted upon him. The very fact that the statute which prohibits the importation of opium also prohibits the concealing of it after its importation or the facilitating of its transportation shows that Congress perceived that the opium might in fact be imported or brought into this country, and, when so imported or brought in, would necessarily be "merchandise" within the meaning of the statutes.

If it be said that articles whose importation is prohibited are not on that account "merchandise," it would seem that the principle would have to be extended also to the importation of articles without paying the duties thereon, or without complying with other provisions of the customs revenue laws. It could not be possibly said that articles which were fraudulently brought into the country without the payment of duties were not merchandise on account of their unlawful importation, and yet the bringing of them in in that manner is punished and subjects the goods to forfeiture. They are not "legally capable of being imported" any more than articles whose importation is prohibited, since they can only be

legally imported by payment of the duties, a condition which has not been performed.

The authorities to the effect that prohibited articles are none the less "merchandise" seem to be clear. Section 3082 of the Revised Statutes provides that, if any person shall fraudulently or knowingly import or bring into the United States any *merchandise*, contrary to law, he shall be punished and the merchandise forfeited. In *United States* v. *Thomas*, 4 Ben. 370, 373–375, Fed. Cas. No. 16473, it was held that this section did not apply at all to goods imported without the payment of duties, but applied only to goods imported in a manner or form contrary to law, or whose importation was altogether forbidden, thus expressly holding that goods whose importation was forbidden were nevertheless "merchandise" within the meaning of section 3082, Revised Statutes. A ruling to precisely the same effect was made in *United States* v. *Claflin*, 13 Blatch. 178, 186, Fed. Cas. No. 14798. In *United States* v. *Kee Ho*, 33 Fed. 333, 335, Judge Deady said of section 3082, Revised Statutes:

> The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling, or clandestine introduction of goods into the United States without passing them through the customhouse, and with intent to defraud the revenue of the United States. But its language is broad enough to include, and does include, every case or form of illegal importation, even where

the intent to avoid the payment of duties does not exist, as the bringing in of prohibited goods or goods packed in prohibited methods.

In *United States* v. *Merriam*, 13 Int. Rev. Rec. 11, 26 Fed. Cas. pp. 1237, 1239, Judge Longyear doubted the construction of section 3082, Revised Statutes, as not extending to goods imported without payment of the duty, but he did not in the least intimate any doubt that the section extended to goods whose importation was prohibited.

In *Estes* v. *United States*, 227 Fed. 818, it appeared that the Secretary of Agriculture had made a regulation, under the animal quarantine act, to the effect that no cattle should be imported into the United States from the Republic of Mexico without inspection by an inspector of the Bureau of Animal Industry and a finding that they were free from disease. The defendants had imported certain cattle into this country (such cattle not being dutiable under the customs laws) without the requisite inspection, and they were indicted for a violation of section 3100, Revised Statutes, which prohibits the importation of merchandise and all other articles without inspection by an officer of the customs, and of section 3082, Revised Statutes referred to above. It was held that both sections had been violated, that is, that such cattle, although prohibited from importation into this country without inspection under the quarantine act, were nevertheless "merchandise" imported into this country, if the owners thereof succeeded in avoiding the quarantine inspectors.

In *Daigle* v. *United States*, 237 Fed. 159, 163, 165, it appeared that the Secretary of Agriculture had promulgated a quarantine against potatoes from Canada, and certain potatoes were libeled for a violation of section 3082, Revised Statutes, and 3100, Revised Statutes, referred to above, in that they had been imported from Canada, contrary to law, and without inspection by the customs inspectors. The Court of Appeals for the First Circuit held that, if the libel had alleged that the goods had been knowingly brought into the United States contrary to law because their importation was prohibited under the order of the Secretary of Agriculture, there would be little doubt that the potatoes would be subject to seizure and condemnation under section 3082, Revised Statutes, holding, however, that this section was not applicable on account of the lack of the necessary allegations in the libel. The Court of Appeals went on to hold that the importation, nevertheless, under the circumstances, was a violation of section 3100, Revised Statutes, the court saying:

> But the contention is made that the potatoes here in question were not subjects of import even as nondutiable articles, for their importation was prohibited under the plant quarantine act and the order of the Secretary of Agriculture, and the question is whether the provisions of section 3100 apply to merchandise the importation of which is prohibited, and require that it, on being brought "into the United States from any contiguous foreign

country, * * * shall be unladen in the presence of, and be inspected by, an inspector or other officer of * * * customs at the first port of entry or customhouse in the United States where the same shall arrive." Although merchandise the importation of which is expressly prohibited can not lawfully be imported, it does not follow that its introduction into the country will not also be contrary to the provisions of section 3100 if not submitted for inspection, so that it may be excluded. The provisions of section 3100 are broad in their terms. They contemplate that "all merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country" shall be subjected to inspection at the first port of entry or customhouse in the United States where the same shall arrive, with the single exception provided for in section 3102 (Comp. St. 1913, sec 5814), which has nothing to do with this case.

We are therefore of the opinion that all merchandise introduced into this country from Canada, whether subject to duty, free from duty, or the importation of which is prohibited, is introduced in violation of law if not submitted for inspection as required by section 3100, and that the District Court was right in ruling that the plant quarantine act and the order of the Secretary of Agriculture did not constitute a defense to the libel as applied to the fourth count.

In *Feathers of Wild Birds* v. *United States*, 267 Fed. 964, section 3082, Revised Statutes, was expressly applied to articles whose importation into this country is absolutely prohibited, the Court of Appeals for the Second Circuit saying:

> We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

The most important decision, however, upon the subject, and one which seems to be decisive of the case at bar in all its aspects, is the unanimous opinion of this court, delivered by Mr. Justice Story, in the case of *Harford* v. *United States*, 8 Cranch, 109. As the opinion is short, it is quoted in full:

> The principal question in this case is whether goods and merchandize, the importation of which into the United States was prohibited by the act of *18th of April*, 1806, *vol.* 8, *p.* 80, were within the purview of the *50th section of the collection act of 2d of March*, 1799, *vol.* 4, *p.* 360, so that the unlading of them without a permit, etc., was an offence subjecting them to forfeiture.
>
> It has been contended on behalf of the claimant that they were not within the purview of the 50th section, because that section applies only to goods, wares, and merchandize, the importation of which is lawful. To this con-

struction the court can not yield assent. The language of the 50th section is, that "no goods, wares, or merchandize, etc., shall be unladen, etc., without a permit;" it is therefore broad enough to cover all goods, whether lawful or unlawful. The case, being then within the letter, can be extracted from forfeiture only by showing that it is not within the spirit of the section. To us it seems clear that the case is within the policy and mischief of the collection act, since the necessity of a permit is some check upon unlawful importations, and is one reason why it is required. The act of 1806 does not profess to repeal the 50th section of the collection act as to the prohibited goods, and a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable. No such manifest repugnance appears to the court. The provisions may well stand together and indeed serve as mutual aids.

In fact the very point now presented was decided by this court in the case of *Locke, claimant*, v. *The United States*, at February term 1813.

It will be seen that the court in this opinion distinctly holds that articles whose importation into this country is absolutely prohibited are, nevertheless, "goods, wares, and merchandise" within the meaning of the customs revenue acts.

It is submitted, therefore, both on principle and authority, that the word "merchandise" in section 2809, Revised Statutes, can not be limited, either by

reason of its ordinary meaning, or by reason of the provisions of section 2766, Revised Statutes, so as to exclude from its scope articles whose importation into this country is absolutely prohibited.

(2) The next question is whether or not, where articles whose importation into this country is absolutely prohibited are nevertheless physically brought within the territorial limits of this country, they can be said to have been "brought into" this country within the meaning of section 2809, Revised Statutes.

Of this it would seem there can be no doubt. The statutes generally use the word "import," and it would seem that clearly the words "brought into" are added to the word "imported" so as to broaden its meaning and include cases where a technical importation might be said not to have taken place. The word "importation" as used in the customs revenue laws is thus defined by this court in *Arnold* v. *United States*, 9 Cranch 104, 120:

> It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district but also within the limits of some port of entry.

It will be observed that nothing is said in this decision as to the character of the articles being material; that is, whether they are articles whose importation is forbidden or not.

In the cases referred to above, namely, *United States* v. *Thomas*, *United States* v. *Claflin*, and *United States* v. *Kee Ho*, it was held that there could be an "importation" of prohibited articles within the limited meaning of that word as used in the customs revenue statutes. In the case of *The Schooner Boston*, 1 Gallison 239, Fed. Cas. No. 1670, it appeared that the schooner came into the port of Boston having on board certain goods whose importation into this country was absolutely prohibited under the President's proclamation made pursuant to the embargo act. It was claimed that the vessel had come into the port of Boston merely to find out whether the goods could be lawfully brought into this country or not and that, after finding that they could not be lawfully imported, the destination of the vessel had been changed to a foreign country. Mr. Justice Story held, nevertheless, that this was an importation into the United States, and that the vessel and the cargo were subject to forfeiture. After pointing out expressly that the importation of these goods was absolutely prohibited, Justice Story said:

> The cargo was taken on board with the intention to be imported, and was actually imported into the United States.

If the physical bringing into this country of prohibited articles may be (as the authorities above show

it is) an "importation," it follows *a fortiori* that such a physical transportation of the prohibited articles into this country would constitute a bringing in of them within the meaning of sections 2806 and 2809, Revised Statutes. The words "bring into" or "brought into" are evidently broader words than "import into," and must have been used by Congress for the very purpose of covering the illegal transportation of goods into this country where a technical importation into a port of entry has not taken place.

(3) The third question involved in the case at bar, viz, whether there is any duty to "manifest" prohibited articles within the meaning of section 2809, Revised Statutes, is (we agree) more difficult. Yet it would seem that here, too, the manifesting of prohibited articles is within both the letter and spirit of sections 2806 and 2809, Revised Statutes.

The word "manifest" is apparently a somewhat modern one. In Lord Hale's *Treatise Concerning the Customs* (Hargrave's Law Tracts, pp. 219, 220,) it is said that the master is obliged to give an account to the revenue authorities of the goods under his charge, and to make a just and true entry of certain matters, which, it seems to be supposed, he will obtain from the bills-of-lading. In the Oxford dictionary the following definition of the word "manifest" is given:

> The list of the ship's cargo, signed by the master, for the information and use of the officers of customs.

The first citation of the word, however, with this meaning appears to be in 1744, and an earlier citation of it in 1706 reads as though the manifest was merely a draft of the cargo, showing what is due for freight. At any rate, the modern meaning of it, as used in the customs revenue acts, is undoubtedly that given in the Oxford dictionary, viz, a list of the ship's cargo for the information and use of the officers of customs.

The contents of the manifest are prescribed in great detail in section 2807 of the Revised Statutes as amended. The third paragraph (being the important one to the case at bar) provides that the manifest shall contain

> "A just and particular account of all the merchandise, so laden on board" (that is, laden on board in a foreign port), "whether in packages or stowed loose, of any kind or nature whatever."

There is nothing in this language to indicate that articles whose importation is prohibited are not to be included. Indeed, it seems evident that they are included within the letter of the statute which includes all merchandise of every kind whatsoever, and makes no exceptions. It should be observed also that the manifest must contain an account of the sea stores on board the vessel, although such articles are not merchandise, are not imported, and are not subject to duties.

It is submitted that articles whose importation into this country is prohibited are within the letter

of sections 2806, 2807, and 2809, Revised Statutes, and must be included in the manifest as prescribed by those sections unless some strong reason exists to take them out of the spirit of the statute, so that to apply the statute to them would work an absurdity or an injustice.

It is to be observed that the manifest is prescribed by the statutes for the information and use of the officers of the customs. If the duties of such officers were confined solely to the collection of revenues upon importations, there would be great force in the argument that to require the manifest to include prohibited articles would be an injustice and an absurdity. The duties of customs officers, however, are not so limited. In fact, they are the general guardians and custodians of the boundary lines of this country, and it is part of their duty to protect those boundaries from transportation across them of any articles brought in in a manner prohibited by law, no matter whether the illegality consist in a violation of the customs laws or not. This can be clearly seen from the fact that sections 4197, 4198, 4199, and 4200 of the Revised Statutes expressly require manifests of outward bound cargoes. Evidently this requirement can have nothing to do with the collection of customs duties and shows clearly that Congress intended that the customs officers should have complete information for all purposes of every article of merchandise contained in vessels coming to or going from this country.

Consequently this has been in effect the holdings of the courts. In *United States* v. *50 Waltham Watch Movements*, 139 Fed. 291, 299, 300, it was held that goods which were not dutiable must, nevertheless, be declared to the customs officers. The same rulings were in effect made in *United States* v. *Burnham*, 1 Mason 57, 63, in *Jackson* v. *United States*, 4 Mason 186, 190; and in *United States* v. *20 Cases of Matches*, 2 Biss. 47, 50, it was held that a permit was necessary for unloading goods transported from one place in the United States to another but through a foreign country, although the goods were not subject to duty. In *Goldman* v. *United States*, 263 Fed. 340, 343, the court said, in making a similar ruling to the effect that nondutiable goods, nevertheless, could not be unladen without a permit:

> We think section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them, but to make disobedience of them criminal.

An even more direct authority is the case of *Daigle* v. *United States*, 237 Fed. 159, 163, 165, referred to above, where it was held that section 3100, Revised Statutes, which provides that all goods imported into the United States from any contiguous foreign country shall be unladen in the presence of and be inspected by an officer in the customs applied to articles whose importation into this country was prohibited. It seems impossible to distinguish between the requirement of a manifest under section 2809, Revised Statutes, and the requirement of inspection under section 3100, Revised Statutes.

But the Government relies mostly on this phase of the case, as well as on the other phases of it, on the decision of this court in *Harford* v. *United States*, 8 Cranch 109, referred to above. In that case it was held that articles whose importation was prohibited were subject to the provisions of the customs laws prohibiting an unloading without a permit. Every reason which can be urged against the requirement of a manifest as to prohibited articles could be equally well used against the requirement of a permit for unloading. In the latter case it could be equally well said that the master could not be expected to ask a permit to unload goods whose importation was prohibited, and that to require him to do so would be to require him to convict himself of an offense. Nevertheless, this court held that the requirement was necessary in the case of prohibited articles as in the case of other articles for the reason that the customs officers were entitled to full information in regard to

all articles brought into this country as a matter of fact whatever their nature might be, or whether their importation was permitted or prohibited.

It is suggested, as it was suggested above in regard to the other two points, that the decision of the courts below in the case at bar has, when analyzed, a much broader scope than appears upon its face. It is difficult to see why, if the manifest be of no importance as to prohibited articles, it is not equally of no importance in regard to articles imported into this country without the payment of duties which have legally accrued upon them. Suppose that the defendant, in the case at bar, instead of intending to bring into this country for sale prohibited articles, intended to smuggle in articles whose importation was permitted, without the payment of the duty thereon. It would seem that in the latter case, just as much as in the former, he would have no inclination to manifest the articles, and, if he did manifest them, his very act of so doing would tend to convict him of the crime of smuggling. If, therefore, it be unnecessary for him to manifest prohibited articles, it is difficult to see why it should be necessary for him to manifest articles which he intends to smuggle into this country. Yet, of course, his duty to manifest in the latter case is entirely clear and would, no doubt, be admitted by everyone. The argument on the other side appears to be that, since the manifest is required for the purpose of preventing the importation into this country contrary to law of merchandise, therefore the manifest should only include those

articles whose importation is intended to be lawful. This view appears to be a complete *non sequitur*. The object of section 2809 is to penalize the bringing in of articles to this country contrary to law by providing that, if they do not appear upon the manifest, they shall be forfeited and the master of the vessel shall pay a penalty. It is their absence from the manifest which is important, not their presence on it. The duty to manifest everything is placed upon the master, and the dereliction of that duty is made punishable, no matter that it is inconceivable that the master, under the circumstances, would perform the duty.

In the case at bar, of course, the master knew of the presence of the opium on board of his vessel, and could therefore very easily have listed it on the manifest. Cases, however, must frequently arise where articles whose importation is prohibited are concealed upon the vessel in such a way as to make it difficult, if not impossible, for the master to include them in the manifest. Nevertheless, it has been held that the master is not excused by such facts, that it is still his duty to enter such articles on the manifest, and that he may be liable to a penalty for failure to place them upon the manifest, although he did not know of their existence on the vessel. See *The Missouri*, 9 Blatch. 433, 436; *The Queen*, 11 Blatch. 416, 418; *Ten Thousand Cigars*, 2 Curtis 436, 438. This latter case is a decision of Mr. Justice Curtis on the circuit. It appeared that there was no bill of lading for the goods in question nor any invoice thereof.

Mr. Justice Curtis held, nevertheless, that a manifest signed by the master was necessary.

Before closing this branch of the subject attention should be called to section 8 of the act of January 17, 1914 c. 9, 38 Stat. 277. That section provides that whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections 2806 and 2807 of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes. This section would appear to be a egislative declaration that, at any rate in so far as opium prepared for smoking is concerned, it falls within the provisions of section 2809, for the object of section 8 of the act of January 17, 1914 c. 9, is clearly to add to the penalty, which Congress believed to exist already under section 2809, Revised Statutes, a lien upon the boat to give additional security for the penalty. The view of Judge Cushman of the district court that the language of section 8 of the act of January 17, 1914 c. 9, refers only to medicinal opium seems to be entirely impossible. Smoking opium is, of course, a derivative of opium, it is the article dealt with in the act of January 17, 1914 c. 9, and it is the article which naturally Congress would have made such a provision in regard to. While, of course, the fact that Congress thought that section 2809, Revised Statutes, covered

smoking opium and other prohibited articles is not at all conclusive as to the proper construction of that statute, nevertheless it falls in with the other reasoning and authorities quoted above to the same effect.

II.

The fact that the importation of the articles in question is prohibited does not destroy absolutely their value so as to make the application of Section 2809, R. S., to them impossible.

Judge Cushman in the district court held, in the case at bar, that 2809, Revised Statutes, could not be applied to the present case because opium had no value, being an article which was absolutely contraband and whose sale, therefore, was forbidden. The majority of the Court of Appeals did not find it necessary to pass upon this point, but Judge Hunt in dissenting felt obliged to consider it and held that opium did have a value, and that the value in the present case was established by the admissions of the defendant as to what he paid for the opium. It would seem that this decision of Judge Hunt's is correct. The fact that an article is prohibited from commerce would destroy its value if every person obeyed the law. This court, however, is aware that such an ideal condition does not exist and that, in fact, the law is broken in regard to some articles not infrequently. Where there is an illicit business in the article, the article has necessarily a value which can be determined by inquiry into the price paid for it in the for-

bidden market. That is the case with opium, which has a well established value in the places where it can be bought in contravention of law.

CONCLUSION.

The judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, Petitioner, *against* WESLEY L. SISCHO, Respondent.	Motion for Leave to Intervene as *Amicus Curiae*.

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Now comes Cletus Keating, counsel for John Reed, the defendant respondent in the case of the United States of America, plaintiff, against John Reed, defendant, 274 Fed. 724, now on appeal to the United States Circuit Court of Appeals for the Second Circuit, and prays leave of Court to intervene in the above entitled cause as *amicus curiae*, and as such *amicus curiae* upon the hearing of this cause, to submit a brief in support of respondent and to take part in the oral argument of the cause.

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Dated, January 25, 1922.

CLETUS KEATING,
Counsel for John Reed,
No. 27 William Street,
New York City.

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SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, Petitioner, *against* WESLEY L. SISCHO, Respondent.	Petition in Support of Motion.

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Now comes Cletus Keating, counsel for John Reed, defendant respondent in the case of the United States of America, plaintiff, against John Reed, defendant, intervening as *amicus curiae,* and represents to this Honorable Court:

I. That on or about the 20th day of January, 1921, the United States of America by the United States Attorney for the Eastern District of New York, filed a complaint in the District Court for the Eastern District of New York, against John Reed.

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II. The complaint set forth two causes of action:

1. That on or about January 4, 1921, while the defendant was master of the Steamship *Royal Prince* "certain merchandise", to wit, thirteen cans of smoking opium, was brought into the United States by the said steamship from Rotterdam, Holland; that the said thirteen cans of smoking opium were not included in nor described in the manifest; that the value of the said merchan-

dise was $650; and that by virtue of the provisions of section 2809 of the Revised Statutes, defendant is liable to a penalty equal to the value of the merchandise, to wit, $650. 7

2. That on or about January 4, 1921, by reason of the foregoing, the defendant was required by virtue of Section 2872 R. S. to obtain and have a permit from the Collector of Customs for the Tenth District of New York, to unload or deliver any merchandise brought in on any vessel from a foreign port; that the said defendant did on or about January 4, 1921, unload and deliver from the steamship *Royal Prince* certain merchandise, to wit, thirteen cans of smoking opium which was 8 brought into the Port of New York by the steamship *Royal Prince* from a foreign port, without having a permit from the Collector of Customs for the Tenth District of New York for such unloading and delivery; that by reason of the foregoing facts and by virtue of section 2873 of the Revised Statutes, the defendant became liable to a penalty of $400.

III. Defendant filed a demurrer to both causes of action on the ground that the complaint did not state facts sufficient to constitute causes of action. The demurrer was sustained by Judge Chatfield and final judg- 9 ment was entered against the plaintiff and the complaint dismissed.

IV. Plaintiff sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit and the case duly came on to be argued on January 18th and 19th, 1922.

10 V. On January 24, 1922, Honorable Charles Merrill Hough, Circuit Judge, addressed a letter to the United States Attorney for the Eastern District of New York and to Cletus Keating, advising that the Circuit Court of Appeals for the Second Circuit had concluded, after examination of the record, to defer decision until after the Supreme Court had decided the *Sischo* case.

VI. The same questions of law involved in the *Sischo* case are involved in the *John Reed* case.

11 VII. The questions involved in this cause are of great importance to shipping interests, by reason of the fact that the United States of America is seeking to punish the masters of ships for failing to do something under one law, for the doing of which they would be punished under another law.

VIII. The petitioner respectfully requests leave of Court to intervene as *amicus curiae* and to submit a brief in support of respondent, and for leave to take part in the oral argument of the cause.

12 Dated, January 25, 1922.

CLETUS KEATING,
Counsel for John Reed,
27 William Street,
New York City.